practiced against it. This is not the case. No finding was made by either the District Court or the Court of Appeals that de facto discrimination existed. The statement made by Aldrich, J. concerning the remedy available in the event the taxing authorities failed to do their duty is dictum. It is a declaration of rights which might accrue if de facto discrimination existed. Certiorari should not be granted to review dicta.

III.

There is no conflict between the decision of the Court of Appeals and decisions of this Court or decisions of other circuits.

Petitioner asserts that a Writ of Certiorari should issue to the Court of Appeals for the Third Circuit on the grounds that its decision in this case is in conflict with applicable decisions of this Court and also in conflict with decisions of other circuits on the issue of whether "a taxpayer against whom intentional, systematic, discrimination is practiced by taxing authorities" is entitled to relief from the unequal assessment.*

Respondents submit that the Court of Appeals did not find that a taxpayer who was subject to such discrimination was not entitled to relief. On the contrary, the Court of Appeals found that the petitioner was not exempt from the Virgin Islands Gross Receipts Tax; and that the tax exemption of the Virgin Islands Gross Receipts Law, 33 V.I.C. Sec. 43 if construed as limited to receipts attributable solely to a taxpayer's own personal services is not unreasonable and arbitrary.

* Petition for Writ of Certiorari p. 5.

Based upon those holdings, the Court of Appeals denied the injunction which petitioner requested.

Upon petition for rehearing, petitioner asserted that the taxing authorities had construed the act differently from the Court's interpretation. The Court made no finding on that question because equality could be achieved by deficiency assessments if petitioner's assertions were true, and, in addition, petitioner had only requested in its prayer for relief, an injunction against the taxing authorities to enjoin the collection of the tax.

In so doing, the Court of Appeals did not deny relief from inequality as asserted by petitioner, it upheld a tax statute as containing reasonable classification and indicated the manner in which it should be construed in order to achieve equality.

The cases cited by petitioner do not conflict with the decision of the Court of Appeals. Under the record of the case as presented to both the District Court and the Court of Appeals, no refund could be granted as in *Iowa-Des Moines National Bank* v. *Bennett,* 284 U.S. 239, and *Concordia Fire Insurance Co.* v. *People,* 292 U.S. 535.

The discrimination practiced by the taxing officials in *Iowa-Des Moines National Bank* was "found or assumed" to exist by the Supreme Court of Iowa, but that Court found the discrimination not to be an act of the State and consequently not within the protection provided by the Fourteenth Amendment. Therefore, the Iowa Court reasoned, "the petitioners had no other remedy but to await action by the taxing authorities to collect the taxes remaining due from their competitors

or to initiate proceedings themselves to compel such collection." *Id.* 242, 243, 244. Such a remedy was held to be inadequate under the circumstances of the case (i.e. knowledge of the discrimination by the taxing officials coupled with inaction).

Concordia Fire Insurance Company v. *People,* 292 U. S. 535, also involved an action to recover taxes levied. The adequacy of remedies other than a refund are not discussed in the opinion. Both *Iowa-Des Moines National Bank* and *Concordia Fire Insurance Co.,* require equality of treatment. Such equality could also have been achieved if the discrimination had been removed by collecting the tax from those favored by the discrimination, *Iowa-Des Moines National Bank* v. *Bennett,* 284 U.S. 239, 247.

Reassessment was requested in *Cumberland Coal Company* v. *Board of Revision, Etc.,* 284 U.S. 23, *Hillsborough TWP* v. *Cromwell,* 326 U.S. 620, and *Hamilton National Bank* v. *District of Columbia,* 156 F.2d 843 (D.C. Cir. 1946). All three of these cases involved assessment methods which were unfair. In the *Cumberland Coal Company* and *Hamilton National Bank* cases the remedy granted was a remand to the Tax Assessors with directions to readjust the assessments to achieve equality. In doing so, the Court in the *Hamilton National Bank* case instructed the Board of Tax Assessors to "cancel the present assessment unless the Tax Assessor . . . *removes the discriminations presently existing,* . . . (emphasis supplied) *Hamilton National Bank* v. *District of Columbia,* 156 F.2d 847, 848. The decision of the Court of Appeals herein is consonant with this.

The *Hillsborough TWP* case stands for the proposition that Federal Courts may enjoin the action of a state taxing authority where the *only* remedy of a taxpayer against discriminatory taxation under state court decisions was to seek an upward revision of the taxes of other members of his class. The taxes were held to be illegally assessed under the state law. The Court stated that the right to equality of treatment would not be breached if equality were achieved by increasing the same taxes of other members of the class. *Hillsborough TWP* v. *Cromwell,* 326 U.S. 620, 623. It was the placing of the burden of bringing suit to compel that result upon the taxpayer which rendered the available remedy inadequate.

The two remaining cases cited by petitioner dealt, as does petitioner's, with prayers for injunctions. *Raymond* v. *Chicago Union Traction Company,* 207 U.S. 20 does not conflict with the holding in the instant case. In that case, the Court upheld the granting of an injunction against taxing officials forbidding the collection of a discriminatory tax. Payment of the tax would have rendered the Traction Company insolvent and a refund was only partially to be gotten after much difficulty and numerous lawsuits. Thus grounds for injunction, irreparable harm and inadequate remedy at law, existed. The principle of equality of treatment is the same as upheld by the Court of Appeals herein. Moreover the irreparable harm present in Chicago Traction Company is not evident in the record here. In addition, as stated in I above, the question of an injunction is moot.

The decision of the Court of Appeals does not conflict with *Knowles* v. *First National Bank of Shenan-*

doah, 58 F.2d 232 (CCA 8, 1932) which was decided immediately following *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239. The discriminatory taxation existing in the former case was the same discriminatory taxation existing in the latter case. Consequently, the Circuit Court of Appeals granted the relief requested. The alternate form of relief, achieving equality by increasing the assessments of competitors, had not been done by the taxing officials when it was shown to be discriminatory in *Iowa-Des Moines National Bank*.

CONCLUSION

The petition should be denied.

Respectfully submitted,

FRANCISCO CORNEIRO
Attorney General of the Virgin Islands
DAVID KELSO MCCONNELL
Of Counsel

APPENDIX

AFFIDAVIT OF VIGGO A. HENDRICKS

Now Comes respondent Viggo A. Hendricks, who being duly sworn, deposes and says:

1. He is over the age of twenty-one years and resides in St. Thomas, Virgin Islands of the United States.

2. He is the Chief of the Tax Processing Branch, Tax Division, Department of Finance of the Government of the Virgin Islands and in this capacity is responsible for the collection of gross receipts taxes.

3. Antilles Surveys, Inc., has made payments on account of its gross receipts taxes as follows:

Year	Tax	Date Paid	Interest	Date Paid	Penalty	Date Paid
1960	847.67	3/23/65	251.47	3/23/65	218.67	10/19/65
1961	521.24	3/23/65	118.15	3/23/65	130.31	10/18/65
1962	720.29	3/23/65	130.10	3/23/65	197.57	10/18/65
1963	600.60	3/23/65	62.94	3/23/65	150.15	10/18/65

VIGGO A. HENDRICKS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 410

ANTILLES SURVEYS, INC.,
Petitioner,

v.

PERCY DE JONGH, as Commissioner,
Department of Finance

and

VIGGO A. HENDRICKS, as Chief Tax Processing
Branch, Department of Finance,
Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1. The tax paid by Petitioner was paid under protest and is recoverable.

It is stated in Respondent's Brief in Opposition, under grounds I and II, as reasons for denying the writ, that the tax levied under the questioned assessment has been paid, and that, therefore, the question of its validity is moot.

As reflected by stipulation between counsel for the respective parties set forth in the Appendix hereto, this